Supreme Court, U.S.
FILED
MAY 6 1992
OFFICE OF THE CLERK

(3)

No. 91-1610

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

WILLIAM JENNINGS, *et al.*,

Petitioners

v.

JOSHUA INDEPENDENT SCHOOL DISTRICT, *et al.*,

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Brief in Opposition to Petition for Certiorari

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Respondents Joshua Independent School District (hereafter "JISD"), superintendent Charles Greenawalt, and assistant principal Larry Loftin (collectively referred to as "School Defendants"), hereby respectfully submit their Brief in Opposition to Certiorari.

STATEMENT OF THE CASE

Petitioners ask this Court to review Rule 11 sanctions imposed jointly and severally against plaintiff Jennings and his attorney for filing and persisting in a groundless lawsuit.

On the original appeal[1] the Court of Appeals quoted with approval the trial court's finding that:

> Plaintiffs, counseled by their attorney, sued Defendants knowing at the outset what the evidence, for the most part, would show. . . . Surely, the outcome was foreseeable to Plaintiff's attorney, if not entirely plain to Plaintiff William Jennings himself. It is apparent from Plaintiff William Jennings' testimony that his only purpose in bringing suit was to harass all the defendants. Plaintiff's attorney cooperated fully in this endeavor. Certainly, it is this type of practice by parties and their attorneys that Rule 11 was meant to eliminate.
>
> Appendix at 39a.

The Court of Appeals further held:

> Because it should have been clear at the outset to Jennings and his attorney that even if the county judge had issued the warrant on insufficient probable cause, the facts could not have supported claims against any of the named defendants except Officer Stevens, the district court did not abuse its discretion in imposing Rule 11 sanctions jointly and severally upon Jennings and his attorney, Don Gladden, for their claims against the school defendants, dog handlers and dog owners. [citations omitted]
>
> Appendix at 41a.

The Court of Appeals affirmed the district court's judgment on the merits, and findings that attorney fees should be awarded both under 42 U.S.C. § 1988 and Rule 11. Appendix 37a. The Fifth Circuit's en banc decision in *Thomas v. Capital Sec. Services, Inc.*, 836 F.2d 866 (5th Cir. 1988) (en banc) was rendered after the district court's initial decision in this case.

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[1] *Jennings v. Josuha ISD*, 877 F.2d 313 (5th Cir. 1989) (on rehearing), *cert. denied* 110 L.Ed.2d 668 (1990); Appendix at 39a.

The Court of Appeals (on rehearing) adhered to their affirmance on the merits and as to the Petitioners' joint and several liability for Rule 11 sanctions, but remanded to the district court:

> . . . to address Thomas's mitigation and notice requirements, as well as Thomas's command that the sanctions be the least severe sanctions adequate under the circumstances to promote Rule 11's purposes of education, compensation and deterrence.
>
> 877 F.2d at 321-22; Appendix at 44a.

Jennings and his attorney then filed petitions for certiorari, which this Court denied at 110 L.Ed.2d 668 (1990).

On remand, the district court – without a hearing or inviting briefs from the parties – found that Respondents discharged their duty to mitigate, but did not give adequate notice to Petitioners that their case was groundless and potentially subjected them to sanctions. The Court of Appeals found this to be clearly erroneous. Appendix at 6a. Defendant's original answer pleaded:

> Your Defendants would show that Plaintiff's suit is without substantial merit and is filed in bad faith for purposes of vexation, abuse, or in an attempt to harass or embarrass Defendants. Accordingly, Defendants are entitled to an award of reasonable attorney's fees for their defense herein.
>
> Appendix, 7a.

The district court further found that a reduction of the fee award by one-half was the least severe sanction adequate to accomplish Rule 11 purposes.

Petitioners appealed. Chief Judge Clark, writing for a unanimous panel, said:

> The legal basis for such joint liability was made clear. Both Gladden and Jennings failed to conduct a reasonable inquiry into the facts or law before filing the lawsuit. Gladden filed the pleadings and Jennings signed a sworn affidavit to oppose the defendants' motion for summary judgment. Jennings' only purpose in bringing this action was to harass the defendants. *Jennings*, 877 F.2d at 320.

Jennings II, 948 F.2d 194 (5th Cir. 1991); Appendix at 4a.

On the issue, however, of the appropriateness of the sanction, the Court of Appeals found that merely halving the award of attorney fees did not indicate an exercise of discretion to find the point of least severe sanctions. Appendix at 8a, citing *Cooter & Gell v. Hartmarx Corp.*, 110 S.Ct. at 2461. The Court went on to find that the fees attributable to plaintiff ended with the district court's denial of defendants' motion for summary judgment. (Stating, however, that ". . . it is difficult to understand how this wholly frivolous action could have survived any motion for summary judgment." Appendix at 8a.) Since detailed time records were a part of the record on appeal, the Court fixed the amount of such fees and entered judgment accordingly, expressing in so doing the intent of the Court "to bring these proceedings to a close." Appendix at 9a.

The facts of this nearly seven-year old litigation are set forth in *Jennings v. Joshua Independent School District*, 877 F.2d 313 (5th Cir. 1989) (on rehearing), *cert. denied* 110 L.Ed.2d 668 (1990) (Jennings I),[2] and *Jennings v. Joshua Independent School District*, 948 F.2d 194 (5th Cir. 1991) (Jennings II).[3] We respectfully invite the Court's attention to the fact findings in those decisions.

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[2]Appendix 28a-42a (869 F.2d 870), in conjunction with 43a-45a (877 F.2d 313), which is abbreviated in the Appendix to show only the substitution on rehearing for the last three full paragraphs of section IV and section V of the prior opinion.

[3]Appendix 1a-9a.

This was a civil rights action brought under 42 U.S.C. § 1983 against school officials, a policeman, sniffer-dog handlers and other defendants, as a result of a school program intended to educate students as to the dangers of drugs, alcohol and weapons, and to deter them from bringing any of those items to school.

Periodically, as a deterrent, trained dogs sniffed unattended student cars in the high school parking lot. In the event of an alert, the student would be told what the dog was trained to do, asked if there was an explanation, and requested to permit a search of the car. If consent was denied, as it was in this case, the school backed off, withdrew from further participation, and turned the matter entirely over to law enforcement authorities.

Pursuant to Rule 15, we respectfully challenge the assertions in the Gladden petition on pp. 8 and 9 that: (1) ". . . the School Board reached the conclusion that 'alerts' by these dogs were, in and of themselves, sufficient to warrant police involvement, and that '[t]he canines [would] be used to establish probable cause for a search warrant and subsequent forcible entry' into the vehicles of non-consenting students; (2) that school officials called the police "to assist in gaining entry into the automobile of . . . Jennings . . .;" and (3) that the search warrant was obtained and the search made "at the behest of the school officials."

The record and the findings of the Courts below will not support such assertions. To the contrary, the record is undisputed that Superintendent Greenawalt told Jennings and Officer Stevens, when consent to search was not forthcoming, that it would no longer be a school matter, but a police matter (R.10, 299), and requested only that the officer "consider" doing whatever was "legally possible." (R.10, 300) This record, and the fact findings of the Courts below, will not support assertions of school and police entanglement or joint action, or

that the police officer merely did the bidding of the school officials. The record is clear that the police officer acted with total independence in seeking a search warrant, and that the school officials stayed entirely out of it.

Further, under Rule 15, Petitioner Jennings omits the findings of the lower courts, supported by the record, that Jennings was himself a law enforcement officer, had participated in dog searches, and was, prior to filing suit, thoroughly conversant with the Fifth Circuit's decision in *Horton v. Goose Creek ISD*, 690 F.2d 470 (5th Cir. 1982), *cert. denied*, 464 U.S. 1207 (1983).

He testified at trial that he did not think dogs had any place in an educational setting; that by his suit he sought a determination that there should be no sniffing dogs allowed under the Constitution. (R.9, 207) Three months before the alert on his daughter's car, Jennings instructed her that she was not to consent to any search. (R.9, 159-160)

This record will not support the contention that Jennings merely followed his lawyer's advice. The Court of Appeals found that, "It is apparent from Plaintiff William Jennings' testimony that his only purpose in bringing suit was to harass all the defendants." Appendix at 39a.

SUMMARY OF THE ARGUMENT

The decisions of the district court on Rule 11 sanctions, as modified by the Court of Appeals, do not constitute an abuse of discretion, which is the standard of review as held by this Court in *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. ____, 110 S.Ct. 2447, 110 L.Ed.2d 359, 381-82 (1990), and the Fifth Circuit in *Thomas v. Capital Sec. Services, Inc.*, 836 F.2d 866, 872 (5th Cir. 1988) (en banc).

The groundless nature of this lawsuit, as the basis for a fee award under § 1988 or Rule 11, was clearly established by the

findings of the courts below, and supported by the record. There can be no liability under § 1983 just because someone calls the cops and then leaves subsequent decisions and actions entirely within their hands. All these matters were determined adversely to the claims of Petitioners on the first appeal of this case, and certiorari was denied by this Court.

Petitioner Gladden's assertion that the Fifth Circuit is somehow adhering to a "break in causation" theory contrary to this Court's holding in *Malley v. Briggs*, 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986) is: first, clearly not the basis of the Circuit Court's decision (see Appendix 32a-35a, as to officer Stevens, and 35a-37a, as to the other defendants); second, no different from Petitioner's contentions on the prior appeal as to which certiorari was denied; and, third, wholly inapplicable to the facts of this case as to all parties other than the police officer.

Petitioner Jennings' assertions that he ought not to be sanctioned for following his lawyer's advice are untenable in this record because: first, Jennings knew all of the facts at the outset and was himself versed in the law to the extent that he was a law enforcement officer with experience in dog cases and was thoroughly conversant with *Horton*; second, because Jennings' misconduct, independent of his lawyer's, makes him liable for attorney fees because he filed this suit maliciously and in bad faith for the purpose of harassing the defendants, and because he is liable under § 1988; and, third, because, "Any review of Jennings' joint and several liability is foreclosed by [the Court of Appeal's] partial affirmance in [their] prior opinion. *Jennings*, 877 F.2d at 320." See Appendix at 4a.

If there was any conflict in interest between Mr. Jennings and his attorney, it should not affect the rights of these Respondents who had to defend against the aggressive and able advocacy of Mr. Gladden, and now his successors. Those issues, if such there be, are properly between Jennings and

Gladden in another court, in another case, on issues that have nothing to do with the rights of Respondents in this case.

ARGUMENT – REASONS TO DENY THE WRIT

I.

Rule 11, Generally

The Rule 11 standard of review is abuse of discretion. *Cooter & Gell v. Hartmarx Corp., supra; Thomas v. Capital Sec. Services, Inc., supra.* There is no abuse of discretion under this record, no conflict of legal principles between the Fifth and other Circuits, and nothing unique or of overweening importance to merit the attention of this Court.

The findings of the district court in its January 5, 1988, Order fully justified an award of attorney fees under § 1988 and the imposition of sanctions under Rule 11, were supported by the record, and were affirmed by the Court of Appeals in Jennings I. Appendix 27a-42a, as modified on rehearing by Appendix 43a-45a. As stated above, this Court denied certiorari to review those decisions.

Once it is determined that a violation of Rule 11 has occurred, the imposition of an appropriate sanction is mandatory. *Thomas, supra; Jennings II*, Appendix at 5a. The determination that a violation of Rule 11 had occurred was made, affirmed by the Court of Appeals, and certiorari denied by this Court prior to the limited remand.

Accordingly, Petitioners' assertions, which argue that they did not violate Rule 11, have long since been foreclosed. They have had considerably more than their day in court on that issue, and they are appealing here from a judgment reviewing and modifying the appropriateness of the sanctions, and, as to that issue, Petitioners have said nothing at all.

II.

Response to Petitioner Gladden

Petitioner Gladden's position is essentially no different from what it was on the prior appeal.[4] With remarkable stubbornness and persistence, he continues to argue that somehow the Fifth Circuit has placed itself in conflict with this Court's opinion in *Malley v. Briggs*, 475 U.S. 335 (1986). The Court below did not hold that there was a break in causation or an insulation between the actions of the school defendants and the search of the Jennings' car by the policeman. It was not a question of qualified immunity, such as *Malley* was.

Merely calling the police does not subject the caller to liability under § 1983. *Arnold v. International Business Machines Corp.*, 637 F.2d 1350 (9th Cir. 1981); *Williams v. Adams*, 836 F.2d 958 (5th Cir. 1988); *Hernandez v. Schwegmann Bros. Giant Supermarkets, Inc.*, 673 F.2d 771 (5th Cir. 1982); *White v. Scrivner Corp.*, 594 F.2d 140 (5th Cir. 1979); *Benavidez v. Gunnell*, 722 F.2d 615 (10th Cir. 1983); *Butler v. Goldblatt Bros., Inc.*, 589 F.2d 323 (7th Cir. 1978); *Love v. King*, 784 F.2d 708 (5th Cir. 1986); *Triplett v. Azordegan*, 570 F.2d 819 (8th Cir. 1978).

To be liable under § 1983, a defendant must have been personally involved in a wilful act causing the deprivation of a constitutional right, or must have been chargeable with knowledge that subordinates were causing such a deprivation. *Love, supra*, 784 F.2d at 711. Liability exists only if a person subjects another to a deprivation of a constitutional right by an affirmative action, participation in another's affirmation action, or if he omits to perform an act which he is legally required to do, causing such deprivation. *Arnold, supra*. Additionally, under § 1983, state action is required pursuant to some policy, custom or usage. *Monell v. Department of*

[4]No. 89-469 in the Supreme Court of the United States.

Social Services of New York, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

None of that is even remotely involved in this case. Given the undisputed facts, known by Petitioners from the beginning, that the school authorities did nothing beyond using a trained dog to check out unattended cars in the high school parking lot – not even a search within the meaning of the Fourth Amendment, as held by *Horton*, *supra*–; and called a law enforcement officer when consent was refused but did not participate, control or direct the wholly independent actions of the police officer, or even request that the policeman do anything except to "consider" what was "legally possible," we submit that *Malley* is wholly inapplicable, and Petitioner Gladden raises nothing substantially different from his already rejected 1989 petition, and that he presents no viable argument now for the granting of certiorari.

III.

Response to Petitioner Jennings

Petitioner Jennings urges two theories: first, that he is not subject to Rule 11 sanctions because his lawyer signed the groundless pleadings, and he didn't; and, second, because any error of law was the responsibility of his attorney for which he is not responsible. Almost incidentally, the petition complains that Jennings was not separately represented in the first appeal.

We submit, first, that if signing something is the *sine qua non* of Rule 11 (which Jennings admits is not the law), he did sign a sworn affidavit in opposition to Respondents' motion for summary judgment. Appendix 4a.

As to Jennings' lack of separate representation on the first appeal, we have some difficulty knowing what Respondents were supposed to do about that, if, in fact, there was a conflict

of interest between parties over whom Respondents had no control. Conflicts of interest, if such there were, should have their consequences visited on the parties in conflict, not on innocent victims.

Without question the Court of Appeals in Jennings I held that the legal basis for joint liability was clear:

> Both Gladden and Jennings failed to conduct a reasonable inquiry into the facts or law before filing the lawsuit. Gladden filed the pleadings and Jennings signed a sworn affidavit to oppose the defendants' motion for summary judgment. Jennings' only purpose in bringing this action was to harass the defendants. *Jennings*, 877 F.2d at 320.
>
> Appendix at 4a.

The Court further held:

> Any review of Jennings' joint and several liability is foreclosed by this Court's partial affirmance in our prior opinion. *Jennings*, 877 F.2d at 321.
>
> Appendix at 4a.

We submit, further, that Petitioner's poor-me characterization of his role in this litigation bears little resemblance to the record. As shown above, Jennings was himself a law enforcement officer who had participated in dog searches and was well read in the law.

Jennings cites *Business Guides, Inc. v. Chromatic Committee Enterprise, Inc.*, 498 U.S. ____, 111 S.Ct. 922, 112 L.Ed.2d 1140 (1991). On the facts, it is hard to see any relevance to the case at bar, and, on the law, that case is by no means in conflict with any holding of the Court of Appeals in the case at bar. At most, it says that the Supreme Court has not yet defined the parameters of liability under Rule 11 for a nonsigning party. 112 L.Ed.2d at 1161. But, as we have

already shown, Jennings can't qualify as a nonsigner. Even if that were not so, common sense dictates that the presence or absence of an autograph is no window to the soul. It is, as well, no universal yardstick for determining who is, or is not, in violation of Rule 11.

The purpose of Rule 11 is to deter the filing of groundless lawsuits. This lawsuit was groundless. Jennings was in the thick of it, as the record demonstrates, and should not now be allowed to hide behind his lawyer's skirts, for, if it had not been for Jennings, none of this would have happened.

Jennings signed the affidavit in opposition to summary judgment. His motives and his conduct, quite apart from his lawyer's actions, are exactly those which ought to be deterred.

IV.

Summing Up

Rule 11 is intended to serve purposes of education, compensation and deterrence. *Jennings I*, 877 F.2d at 321-22.

Respondents were subjected to a groundless lawsuit brought for purposes of harassment. On every occasion, from original answer to trial, Respondents pleaded that under the undisputed facts the school defendants could not be liable for the search of plaintiff's car, even if unconstitutional (there has been no determination of that issue; the jury exonerated the police officer),[5] because the school officials did not have anything to do with the search. They merely called the police and turned the matter entirely over to them – a police matter, not a school matter – as Superintendent Greenawalt said to Plain-

[5]There is an irony in this case that the police officer who got the search warrant and made the search is no longer an interested party, and his employer, the City of Joshua, was dismissed prior to trial.

tiff Jennings on the parking lot when the matter could not be worked out by consent.

Respondents' motion for summary judgment was overruled.[6] When plaintiff rested after five days of trial before a jury, Respondents moved for a directed verdict, and the district court granted the motions of all defendants except the police officer, whose case went to the jury and resulted in a verdict in his favor.

On the first appeal the Court of Appeals had little difficulty affirming the directed verdict and the correctness of the trial court's imposition of sanctions. The remand was limited to the question of what kind of sanctions were appropriate – not whether, but what kind, of sanction should be applied. This Court denied certiorari. Petitioners then filed in the Court of Appeals what we submit was an unprecedented and frivolous motion to recall the mandate, and on its denial a motion for rehearing and rehearing en banc. The Court of Appeals denied those motions.

On remand, the district court cut the fee award in half without affording Respondents the opportunity for a hearing or to file briefs. On the second appeal, the Court of Appeals further reduced Respondents' fee award on the rationale that Petitioners could not be held responsible for Respondents' costs incurred after the date of the district court's unfortunate failure to grant summary judgment. Perhaps it is not surprising that Petitioners say nothing as to the appropriateness of the award, but rather attempt to reopen and relitigate questions long since decided on the first appeal.

The Court of Appeals also declined to make any further fee award for Respondents' appellate burdens under Rule 38,

[6] Chief Judge Clark noted in the opinion below that ". . . it is difficult to understand how this wholly frivolous action could have survived any motion for summary judgment." Appendix at 8a.

Federal Rules of Appellate Procedure. This Court prophetically recognized that "disallowing an award of appellate attorney's fees under Rule 11 would [possibly] discourage litigants from defending the award on appeal when appellate expenses are likely to exceed the amount of the sanctions." *Cooter & Gell v. Hartmarx Corp.*, 110 L.Ed.2d at 383. Respondents had to defend the first appeal which, as to the merits, was groundless, then a petition for certiorari, and a motion to recall mandate after denial of certiorari and a motion for rehearing en banc on that issue. The bottom line is that Respondents are worse off than they would have been if they had never asked for a fee award.[7]

Now, after nearly seven years of defending against a groundless cause of action that went up and down the appellate ladder, and now comes up again, Respondents must once again defend against the Petitioner's efforts to reopen and relitigate what should have been laid to rest long ago. If the purposes of Rule 11 are education, compensation and deterrence, the results of this case teach that wronged Respondents have little hope of compensation; the lesson is not to ask for sanctions; and the deterrence is on the victim, not the perpetrators.

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[7]Respondents' motion was based on 42 U.S.C. § 1988, and, in the alternative, under Rule 11. The district court found that we were entitled to a § 1988 award, but that sanctions should be imposed against Jennings and his attorney under Rule 11.

CONCLUSION

The petitions for writ of certiorari should be denied.

Respectfully submitted,

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May 6, 1992